LE COPY

Office - Supreme Court, U.S.
FILED
APR 5 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 642 .

JOSEPH DOTO, also known as JOE ADONIS,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

ON APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

RALPH L. FUSCO,
Deputy Attorney General of New Jersey,
For the Prosecutor of Bergen County,
Court House,
Hackensack, New Jersey.

WILLIAM C. BRUDNICK,
Special Assistant Prosecutor,
On the Brief.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

BLEED THROUGH POOR COPY

INDEX.

PAGE

Reference to Official Reports of Opinion Delivered in the Court Below 1

Counter-statement Concerning Jurisdiction 1

Counter-statement of Questions Involved 2

Counter-statement of Facts 3

Preliminary Statement 4

Argument:

Point I. The Court's rulings as to the admissibility of the documentary evidence present no federal question or basis for review nor do they contravene the due process clause of the Federal Constitution 4

Point II. Aside from defendant's failure to object to the alleged variance between the indictment and the proof adduced, it was raised for the first time on the appeal and in any case presents no federal question 10

Point III. It appears from the entire record of the proceedings that the defendant received a fair and impartial trial and that the evidence supports the finding of the court 13

Conclusion 19

Appendix—Statutes Involved 21

CITATIONS.

	PAGE
Allen v. *Alleghany Co.*, 196 U. S. 458 (1904)	9
Barrington v. *Missouri*, 205 U. S. 483 (1906)	7, 12
Buchalter v. *New York*, 319 U. S. 427, 429, 431 (1942)	7
Buckley v. *The United States*, 4 How. 251, 258, 11 L. ed. 961	6
Chesapeake & Delaware Canal Co. v. *United States*, 240 F. 903, 907 (C. C. A. 3, 1917) aff'd 250 U. S. 123 (1918)	6
Finnegan v. *United States*, 204 F. 2d 105 (C. A. 8, 1953), cert. den. 346 U. S. 821 (1953), reh. den. 346 U. S. 880 (1953)	6
Frank v. *Mangum*, 237 U. S. 309, 326 (1915)	7
Harrison v. *Metropolitan Life Ins. Co.*, 168 Pa. Super. 474, 79 A. (2d) 115 (Sup. Ct., 1951)	6
Heike v. *United States*, 192 F. 83 (C. C. A. 2, 1911)	8
Howard v. *Fleming*, 191 U. S. 126, 135 (1903)	12
Keenan v. *Burke*, 342 U. S. 881 (1951)	15
Lisenba v. *California*, 314 U. S. 219, 228, 236 (1941)	8
Lopoczyk v. *Chester A. Poling, Inc.*, 152 F. 2d 457, 459, 460 (C. C. A., 1945)	6
Los Angeles Farming, etc. Co. v. *Los Angeles, Cal.*, 217 U. S. 217 (1910)	7
McInerney v. *United States*, 143 F. 729, 736, 737 (C. C. A. 1, 1906)	6
Milwaukee E. R. & L. Co. v. *Wisconsin Ex Rel. Milwaukee*, 252 U. S. 100, 106 (1919)	8
Moran v. *Pittsburgh-Des Moines Steel Co.*, 183 F. 2d 467 (C. A. 3, 1950)	6
O'Brien v. *O'Brien*, 294 Ky. 793, 172 S. W. 2. 595, 609 (1942)	8

BLEED THROUGH POOR COPY

PAGE

Rennicke v. *United States*, 207 F. 2d 429 (C. A. 8, 1953) 6
Rolley, Inc. v. *Young Husband*, 204 Fed. 204, 212 (C. A. 9, 1953) 14

Joseph L. Sigretto & Sons, Inc. v. *State*, 127 N. J. L. 578 (Sup. Ct., 1942) 11
State v. *Borelli*, 27 N. J. Super. 223 (Hudson Co. Ct., 1953) 12
State v. *Costa*, 11 N. J. 239, 246, 247 (1953)..... 12
State v. *Eisenstein*, 16 N. J. Super. 13 (App. Div., 1951) 11
State v. *Ellenstein*, 121 N. J. L. 304, 324 (Sup. Ct., 1938) 11
State v. *Engels*, 32 N. J. Super. 1, 9 (App. Div., 1954) 12
State v. *Janiec*, 11 N. J. 397 (1953) 15
State v. *Ziegler*, 22 N. J. Super. 224 (App. Div., 1952), Aff'd 12 N. J. 520, 524 (1953) 11, 12
Stein v. *New York*, 346 U. S. 156 (1953)..... 8

The Ariel, 119 F. 2d 866, 867 (C. C. A. 2, 1941)..... 6
Townsend v. *Burke*, 334 U. S. 736 (1948) 15

United States v. *Rose*, 113 F. Supp. 775 (D. C. Pa., 1953) 6
United States v. *Rosenberg*, 195 F. 2d 583 (C. A. 2, 1952), cert. den. 344 U. S. 838 (1952), reh. den. 344 U. S. 889 (1952) 6

West v. *Louisiana*, 194 U. S. 258 (1904)..... 7, 8
Western L. Ind. Co. v. *Rupp*, 235 U. S. 261 (1914).. 9
Wheeler v. *United States*, 211 F. 2d 19, 23 (C. A. D. C., 1953) 6

Young v. *Territory of Hawaii*, 160 Fed. 2nd 289, (C. C. A. 9, 1947), cert. den. 331 U. S. 849 (1947)..... 7, 8

FEDERAL STATUTE.

PAGE

28 U. S. C. A. Secs. 1732, 1733 5
28 U. S. C. A. Sec. 1741 6

NEW JERSEY STATUTE.

N. J. S. 2A:82-16 ..... 5, 9
N. J. S. 2A:131-4, et seq. 10

NEW JERSEY RULE.

Rule 1:7-1 15

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

JOSEPH DOTO, also known as JOE ADONIS,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

I.

Reference to Official Reports of Opinion Delivered In the Court Below.*

The petitioner's reference to the opinion below is correct.

II.

Counter-statement Concerning Jurisdiction.

We respectfully submit that the decisions of the Supreme Court of New Jersey in this case involving the questions

---

* Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed record of the Court below, defendant's appendix as it was submitted to the New Jersey Supreme Court.

presented in the petition are in conformity with the provisions of the Federal Constitution(1) respecting due process and equal protection of the laws as guaranteed by the United States Constitution, and that the said Court did not decide any constitutional question of substance in a manner contrary to the decisions of this Court.

We, therefore, respectfully submit that this Court should not entertain jurisdiction and issue a writ of certiorari to review the decision of the Court below.

Counter-questions Presented.

1. Whether the indictment is legally adequate and does it charge a crime?
2. Whether the evidence is sufficient to support the conviction of the defendant for falsely swearing that he was born in the City of Passaic, New Jersey?
3. Whether there was any error in the admission into evidence of:
   (a) The Italian vital statistics records?
   (b) The ship manifests filed with the Immigration and Naturalization Service?
   (c) The 1915 and 1925 New York Census?
4. Whether the defendant received a fair trial?
5. Whether the foregoing questions raise issues reviewable by the United States Supreme Court?

---

(1) Constitution of the United States, Amendment XIV, Section 1.

BLEED THROUGH POOR COPY

Counter-statement of Case.

The defendant, Joseph Doto, better known as Joe Adonis, was brought to trial on January 12, 1954 on two indictments, both returned by the Bergen County Grand Jury on February 17, 1953. One indictment (No. 220, R. 1a) charged that defendant willfully swore falsely before the Grand Jury as to the date of his birth. The other indictment (No. 221, R. 2a) charged that defendant willfully swore falsely before the Grand Jury that he was born in the City of Passaic, New Jersey.

The trial was held before a judge, sitting without a jury at the defendant's request (R. 14a-26). The defendant did not take the stand nor did he offer any evidence in his behalf (R. 229a-21). The Court acquitted him on indictment No. 220 and convicted him on indictment No. 221 for falsely swearing that he was born in the City of Passaic, New Jersey (R. 305a-10). He was sentenced (R. 307a-5 to 30) and is not now in confinement under this sentence.

Defendant appealed to the Superior Court of New Jersey, Appellate Division (R. 212a) which appeal was certified to the Supreme Court of New Jersey on its own motion (Appendix C, p. 48).

The Supreme Court of New Jersey unanimously affirmed the judgment of the Superior Court, Law Division (Appendix A, p. 46). Its opinion is reported in 16 N. J. 397 (1955).

Preliminary Statement.

In view of the fact that the reasons urged by the defendant, Numbers 1, 2 and 5, relate to the admission into evidence of documentary proof, they are discussed in our POINT I. Numbers 3 and 4 are discussed in our POINTS II and III.

ARGUMENT.

POINT I.

The Court's rulings as to the admissibility of the documentary evidence present no federal question or basis for review nor do they contravene the due process clause of the Federal Constitution.

The Supreme Court of New Jersey in reviewing the defendant's contention that error was committed in the trial courts' rulings upon objections by the defendant to introduction of evidence by the State prefaced its remarks as follows (Appendix A, p. 39):

> "* * * Our review is expressly designed to insure that the defendant is not deprived of liberty by any error that prejudices his substantial rights, i. e., to insure that the defendant does not suffer any manifest wrong or injury R. R. 1:5-1 (a)."

It then proceeded *seriatim* to review the documentary as well as testimonial evidence presented by the State (Appendix A, p. 40 to p. 45), concluding that the ship's manifests were properly received in evidence in the present matter (Appendix A, p. 43-28); that the birth certificates

BLEED THROUGH POOR COPY

were properly authenticated and admissible as public records of a foreign state or territory, province, county or city in accordance with N. J. S. 2A:82-16 and in the admission of the New York census records for 1915 and 1925, under N. J. S. 2A:82-16 no manifest wrong or injury was sustained by the defendant (Appendix A, p. 45-17).

It is pertinent to point out that the admissibility of the above documentary evidence was grounded on the Statutes of New Jersey which specifically provide (Appendix F, p. 52):

> N. J. S. 2A:82-16.
>
> "Any public record of any foreign state or territory, province, county or city, or of any court therein or any copy thereof, which is admissible in such state, territory, province, county or city, or in any court therein, to prove the facts therein contained, or any duly certified public record of any department of the United States government or of any federal court which is admissible in any federal court or by virtue of any federal statute to prove the facts therein contained, shall be admitted in evidence in the courts of this state, and shall be evidence of the facts therein contained, to the same extent as though the original paper or papers, of which the record thereof is a copy, had been produced and proved; provided, that whenever a copy of such record, other than a duly certified copy of any public record of any department of the United States government or of any federal court, shall be offered in evidence, the same shall not be admitted, unless the same shall have been first exemplified according to the acts of congress of the United States * * * ".

As incidental to such statute the court determined from the federal statutes, 28 U. S. C. A., secs. 1732, 1733 that

these documents were admissible in the federal courts by virtue of federal statutes (Appendix A, pp. 41-42) and therefore admissible in the trial court.

This determination is not in conflict with the applicable decisions of both Federal and State courts.

See: *McInerney* v. *United States,* 143 F. 729, 736-737 (C. C. A. 1, 1906); *Buckley* v. *The United States,* 4 How. 251, 258, 11 L. ed. 961; *Lopoczyk* v. *Chester A. Poling, Inc.,* 152 F. 2d. 457, 459-460 (C. C. A. 2, 1945); *The Ariel,* 119 F. 2d. 866, 867 (C. C. A. 2, 1941); *Chesapeake & Delaware Canal Co.* v. *United States,* 240 F. 903, 907 (C. C. A. 3, 1917); aff'd 250 U. S. 123 (1918); *Wheeler* v. *United States,* 211 F. 2d. 19, 23 (C. A. D. C., 1953); *United States* v. *Rose,* 113 F. Supp. 775 (D. C. Pa., 1953); *Finnegan* v. *United States,* 204 F. 2d. 105 (C. A. 8, 1953), cert. den. 346 U. S. 821 (1953), reh. den. 346 U. S. 880 (1953); *Rennicke* v. *United States,* 207 F. 2d. 429 (C. A. 8, 1953); *United States* v. *Rosenberg,* 195 F. 2d 583 (C. A. 2, 1952) cert. den. 344 U. S. 838 (1952), reh. den. 344 U. S. 889 (1952), reh. den. 74 S. Ct. 860; *Moran* v. *Pittsburgh-Des Moines Steel Co.,* 183 F. 2d 467 (C. A. 3, 1950); *Harrison* v. *Metropolitan Life Ins. Co.,* 168 Pa. Super. 474, 79 A. 2d. 115 (Sup. Ct., 1951).

The validity of the federal statutes was in no way involved nor was there any determination by the New Jersey Court against the validity of the federal statutes above mentioned.

Likewise, with reference to the Italian birth certificates, the Supreme Court of New Jersey determined that the same were admissible under N. J. S. 2A:82-16 and that they had been duly authenticated in accordance with the federal statute 28 U. S. C. A., sec. 1741.

BLEED THROUGH POOR COPY

These rulings on the admissibility of the documentary evidence under the New Jersey Statute above set forth, furnish no basis for review. That they present no federal question, has long been settled by this court.

In *Barrington* v. *Missouri,* 205 U. S. 483 (1906) the Court said, at page 486, with reference to the admission into evidence of certain statements or confessions:

> "* * * And if, as decided, the admission of this testimony did not violate the rights of the plaintiff in error under the constitution and laws of the State of Missouri, the record affords no basis for the holding that he was not awarded due process of law."

The states are free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate. The Fourteenth Amendment does not permit a party to bring to test in the United States Supreme Court every ruling made in the course of a trial in the State Court nor does it enable this court to review errors of State law however material under the law. *Buchalter* v. *New York,* 319 U. S. 427, 429, 431 (1942). In the last cited case the court said at page 431:

> "* * * As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under the law. We are unable to find that the rulings and instructions under attack constituted more than errors as to State law. We cannot say that they were made as to deprive the petitioner of a trial according to the accepted course of legal procedings."

See also: *Los Angeles Farming, etc. Co.* v. *Los Angeles, Cal.,* 217 U. S. 217 (1910); *West* v. *Louisiana,* 194 U. S. 258 (1904); *Frank* v. *Mangum,* 237 U. S. 309, 326 (1915); *Young*

v. *Territory of Hawaii,* 160 Fed. 2d 289 (C. C. A. 9, 1947) Cert. den. 331 U. S. 849 (1947); *Lisenba* v. *California,* 314 U. S. 219, 228, 236 (1941).

As was said in *Stein* v. *New York,* 346 U. S. 156 (1953) at page 196:

> "* * * The hearsay evidence rule, with all its subleties, anomalies and ramifications, will not be read into the Fourteenth Amendment."

Nor is there any right of confrontation secured by the Fourteenth Amendment as contended by defendant (P. 13-25), *Stein* v. *New York, supra,* at p. 195; *West* v. *Louisiana, supra,* at p. 262. See also *Heike* v. *United States,* 192 F. 83, 94 (C. C. A. 2, 1911). Due process of law does not assure a litigant against wrong interpretaion of law, especially procedural, or against judicial error in admission on exclusion of evidence. *O'Brien* v. *O'Brien,* 294 Ky. 793, 172 S. W. 2, 595, 609 (1942); *Milwaukee E. R. & L. Co.* v. *Wisconsin Ex Rel. Milwaukee,* 252 U. S. 100, 106 (1919).

It is to be observed that nowhere in defendant's petition does he assert that the *validity* of any federal statute was drawn into question. (Italics supplied).

The mere determination by the Supreme Court of New Jersey that the documentary proofs were admissible in evidence and that they satisfied the federal statutes as to exemplification and admissibility does not draw into question the validity of any federal statute nor raise any federal question requiring review by this Court.

It is also to be observed that the admission into evidence of the 1915 and 1925 New York Census after proof that these records were admissible in Courts of records of the

BLEED THROUGH POOR COPY

State of New York as evidence of the contents thereof, and as proof of the number of citizens inhabitants to delimit assembly district boundary lines and that they were required to be kept as a public record (R. 241a to R. 242a) was in accordance with N. J. S. 2A:82-16. No federal question with reference thereto was raised in the trial court nor on appeal (Appendix A, p. 44-36). Defendant contended that they were not admissible as evidence in New York State and hence not admissible under N. J. S. 2A:82-16. It is only now that defendant contends (p. 28) "that a novel federal question is involved respecting whether or not the Courts of the State of New Jersey must give full faith and credit to the public acts of the State of New York. In any event the validity of the New York Statute concededly is not involved and no question can therefore arise under the "full faith and credit" clause of the Federal constitution.

Western L. Ind. Co. v. *Rupp,* 235 U. S. 261 (1914);
Allen v. *Alleghany Co.,* 196 U. S. 458 (1904).

It is submitted that the rulings of the Courts below as to the admissibility of the documentary evidence presents no federal question or basis for review nor do they contravene the due process clause of the federal constitution.

POINT II.

Aside from defendant's failure to object to the alleged variance between the indictment and the proof adduced, it was raised for the first time on the appeal and in any case presents no federal question.

Defendant at the trial did not contend that he was not aware of the charge against him; he didn't object that there was a variance between the indictment and the proofs adduced by the State (P. 8-25), it was raised for the first time on appeal (P. 17-6).

Referring to this phase of the case the Supreme Court of New Jersey, in its opinion, said (Appendix A, p. 35):

> "The first question involved is addressed to the sufficiency of the indictment. Doto contends that in Indictment No. 221 the alleged false statement is not adequately negatived by an averment of the true fact. If error in the format of the indictment exists as alleged by Doto, it is asserted for the first time in this appeal. The indictment sufficiently apprised him of the charge against him and was subject to amendment under R. R. 3:4-5, formerly Rule 2:4-13."

The court however proceeded with this contention contrary to petitioner's statement (P. 17-12) that "the court below did not notice this issue or pass upon it," and pointed out that the case was "a prosecution for the statutory offense of false swearing under N. J. S. 2A:131-4, *et seq.* (Appendix A, p. 35-39); and that:

> "Where the accused 'has sworn only to his belief, it will be proper to aver either that the defendant did not believe what he swore, or that 'he well know'

BLEED THROUGH POOR COPY

> to the contrary! 2 Wharton's Criminal Law, *ante*, sec. 1568, p. 1826. It is said that in this respect indictments for perjuring are sufficient if they state that the testimony of the defendant was false. 41 Am. Jur. Perjury, sec. 33, p. 20. Cf. State *v.* Sullivan, 25 N. J. Super. 484, 492 (App. Div., 1953), certification denied 13 N. J. 289 (1953), Cert. den. 347 U. S. 902, 98 L. ed. (1954) * * *'' (Appendix A, p. 37).

The court concluded:

> "Further the indictment for false swearing is concerned with a statutory offense. The indictment in the present case was in the statutory language and explicitly apprised the defendant of the offense charged. It is in these respects adequate under the principles embodied in State *v.* Harris, 132 N. J. L. 54, 57 (Sup. Ct., 1944). Cf. State *v.* Morris, 98 N. J. L. 621, 623 (Sup. Ct., 1923), aff'd *per curiam*, 99 N. J. L. 526 (E. & A., 1924). The essence of the constitutional right in relation to the sufficiency of an indictment is that the accused be 'informed by the indictment in certain, definite and understandable terms of the crime charged to him.' State *v.* Grothmann, 13 N. J. 90 (1953). We find that Indictment No. 221 meets this test. Cf. State *v.* Kowalczyk, 3 N. J. 51, 55-56, 60-61 (1948)."

This conclusion is more than amply supported by the reported cases in New Jersey.

See:

> *State* v. *Ellenstein*, 121 N. J. L. 304, 324 (Sup. Ct. 1938); *Joseph L. Sigretto & Sons, Inc.* v. *State*, 127 N. J. L. 578 (Sup. Ct. 1942); *State* v. *Eisenstein*, 16 N. J. Super. 13 (App. Div. 1951); aff'd 9 N. J. 347 (1952); *State* v. *Siegler*, 22 N. J. Su-

per. 224 (App. Div. 1952), aff'd 12 N. J. 520, 524 (1953); *State* v. *Borelli*, 27 N. J. Super. 223 (Hudson Co. Ct. 1953); *State* v. *Engels*, 32 N. J. Super. 1, 9 (App. Div. 1954); *State* v. *Costa*, 11 N. J. 239, 246-247 (1953).

Furthermore whether or not the indictment sufficiently charged the offense is not a federal question which can be made the basis of review on certiorari. The defendant recognized in his petition, page 17, that the sufficiency of the indictment does not present a federal question. This the court has so held.

In *Howard* v. *Fleming*, 191 U. S. 126 (1903) the court said at page 135 with reference to the question of the sufficiency of an indictment in the state court:

> "* * * In other words, the Supreme Court decided that a conspiracy to defraud was a crime punishable under the laws of the state, and, that the indictment sufficiently charged the offense. Whether there be such an offense is not a Federal question, and the decision of the Supreme Court is conclusive upon the matter. Neither are we at liberty to inquire whether the indictment sufficiently charged the offense. Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; Davis *v.* Texas, 139 U. S. 651, 652, 35 L. ed. 300, 301, 11 Sup. Ct. Rep. 675; Bergmann *v.* Bocher, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727."

See also *Barrington* v. *Missouri*, 205 U. S. 483, 486-487 (1906).

It is respectfully submitted that the deficiencies of the indictment, if any, present no question for review by this court.

BLEED THROUGH POOR COPY

POINT III.

It appears from the entire record of the proceedings that the defendant received a fair and impartial trial and that the evidence supports the finding of the court.

The defendant urges as a basis for review that he was denied a fair trial by the injection of "inflammatory and prejudicial" proof (P. 22). He states that while the Supreme Court of New Jersey in its opinion remarked that this was a question not presented to the trial court, "To the contrary we maintain that this question was properly presented to the trial court" (P. 22-25 to 30). A reading of the "Statement of the Questions Involved" contained in petitioner's brief on appeal to the State court leaves no doubt as to where the truth lies. He there stated:

> "6. Is the defendant denied fair play where the prosecution injects incompetent evidence of a prejudicial and inflammatory nature which influenced the trial court in arriving at a verdict? This question was not presented to the court below."

As pointed out by the Supreme Court of New Jersey (Appendix A, p. 46):

> "The defendant's question whether he was denied a fair trial by injection of 'inflammatory and prejudicial' proof was admitted by him to be a question not presented to the trial court. This question relates to the evidence of prior arrests and fingerprinting. The trial court ordered stricken from the record the greater portion of this testimony. What remained was incidental disclosures of prior arrests

during the course of a New York police officer's testimony concerning admissions by Doto as to the date of his birth. Under the circumstances of this case, no error is disclosed. Cf. State *v.* Grillo, 11 N. J. 173, 183 (1952), Cert. Den. 345 U. S. 976, 97 L. Ed. 1391 (1953)".

While defendant urges that the fingerprints introduced for identification and the testimony of various witnesses with reference thereto (P. 23 to P. 25) indicates the prejudicial nature thereof, the Court struck all testimony of witnesses in regard to the fingerprints of the defendant (R. 298a-27 to 32) and defendant could not have been prejudiced thereby. This proof was not, as the defendant argues (P. 25), offered to show arrests, but to introduce admissions of the defendant in contradiction of his expressed belief that he was born in Passaic. It was clearly material.

It should, however, be noted that the trial was heard, at the request of the defendant, without a jury and it may be presumed that the judge necessarily disregarded any incompetent evidence. *Rolley, Inc.* v. *Young Husband,* 204 Fed. 204. 212 (C. A. 9, 1953). As a matter of fact he excluded the tendered evidence and in any event the defendant did not suffer any manifest wrong or injury within the Rules of the Court. (Appendix H, p. 56).

Defendant's observations (P. 27) that the trial judge was influenced by the stricken evidence is without merit. These remarks were made on February 2, 1954 the date of sentence (R. 307a), some two weeks after January 18, 1954, the date when the court made its findings of fact and held the defendant guilty as charged. They were obviously based upon the pre-sentence investigation report (R. 308a-7 to 11) required to be made under the New Jersey

BLEED THROUGH POOR COPY

laws, and prepared after the verdict of guilty for the court's use on the day of sentence. They were not such as could deprive the petitioner of a trial according to the accepted course of legal proceedings.

The case of *Townsend* v. *Burke*, 334 U. S. 736 (1948) and *Keenan* v. *Burke*, 342 U. S. 881 (1951) are without application to the matter *sub judice*. There defendant pleaded guilty and false statements were made to the judge upon which the sentence was based. Defendant was without counsel and was afforded no opportunity to correct the improper impression. Such is not the case here.

While defendant did not assert in the State Supreme Court as a question involved "that the trial court's findings were against the weight of the evidence", he sought there to attack the same (Appendix A, p. 46).

The Supreme Court of New Jersey "examined the record meticulously to determine whether the evidence supports the findings and judgment of the Trial Court" (Appendix A, p. 46). It concluded that "the evidence clearly is adequate and we see no occasion to recite it in detail".

From a procedural standpoint, under Rule 1:7-1 of the Supreme Court of New Jersey (Appendix H, p. 56) and the decision thereunder, ordinarily, no point would be considered on appeal which was not set forth in or necessarily suggested by the "Statement of Questions Involved," *State* v. *Janiec*, 11 N. J. 397 (1953). The court would well have refused to consider this question, however it did and as we show below the evidence was clearly adequate to support the findings of the court.

In addition to the documentary evidence the record discloses the following direct evidence.

Witness Laciskey identified the defendant (R. 80a-30) as the person who stated to him on May 29, 1951, that his father was Michael Doto (R. 81a-17), that his mother was Maria DeVito Doto (R. 81a-21) and that they were both born in Italy (R. 82a-7).

Witness Toms identified the defendant (R. 82a-36) as the person who stated to him on August 2, 1951 that his father's name was Michael (R. 83a-19), that he was born in Italy (R. 83a-21), that his mother's name was Mary (R. 83a-24), that she was born in Italy (R. 83a-26), that he had four brothers whose names and age sequence, including himself were, Anthony, the oldest, then Albert, then defendant and a younger brother named James (R. 83a-30 to 33). He also testified that defendant stated that his brother Anthony was born in Italy (R. 83a-35), his brother Albert in Italy (R. 84a-5) and that his brother James was born in New Jersey (R. 84a-17).

Ferdinand DeVito identified the defendant as his nephew (R. 86a-5). He testified that he was born in Montemarano, Italy on January 21, 1880 (R. 86a-5 to 21); that he arrived in New York on May 20, 1901 (R. 87a-29) from Montemarano (R. 94a-24); that his older sister Marie DeVito (R. 86a-30) married Michael Doto, the father of the defendant (R. 88a-13 to 16) and that when he, Ferdinand left Montemarano in 1901 his sister Marie and her husband Michael were living together in Montemarano (R. 94a-30). He further stated that his brother-in-law came to this country in 1903 (R. 89a-31) and lived at 507 President Street in Brooklyn in the same building where Ferdinand lived (R. 89a-34). He stated that Maria was not with Michael at that time (R. 90a-7) nor was she in this country when Michael went back to Italy in 1904 or 1905 (R. 90a-

BLEED THROUGH POOR COPY

22 to 23) or when he came back to the United States in 1906 (R. 90a-28 to 36). It was in 1909 or 1910 that his sister Maria first came to this country (R. 90a-39 to R. 91a-7). Ferdinand further testified that his sister Maria had five children with Michael Doto (R. 91a-12) who, in order of their birth are Anthony, Albert, Joseph, Jimmie and a sister who died (R. 91a-35 to 39); that the defendant is the Joseph named (R. 92a-14); that Michael sent for Maria (R. 95a-28) while he was living at President Street in Brooklyn to which the Doto family came to live when Maria arrived in this country (R. 95a-15 to 22); that he visited Maria and her family at President Street and that the family of Michael and Maria consisted of the children Anthony, Albert, Joseph, James and Angelina (R. 96a-6 to 27). He didn't remember whether his brother-in-law Michael ever lived in Passaic, New Jersey (R. 98a-17).

John DeVito identified the defendant as his nephew, the son of his sister Maria (R. 98a-38). His testimony is identical with that of his brother Ferdinand and corroborates the arrival of his sister Maria in 1909 or 1910 with her children whose names in the order of their ages were Tony, Al, Joe and Jimmie the Italian equivalents of which he stated are Antonio, Umberto, Giuseppe and Generio (R. 99a-32 to R. 105a-40).

Anthony Doto identified the defendant as his brother Joseph (R. 116a-24 to 28). He testified that he was born in Montemarano, Italy on November 12, 1898, that his father was Michael, his mother Maria, whose maiden name was DeVito (R. 116a-32 to 40) and that he came to this country in 1909 (R. 117a-5). He further testified that he has three brothers, younger than he and in the order of

their ages they are Albert, Joseph and Jimmie, Albert being two years younger than he, and Joseph two years younger than Albert (R. 117a-36 to R. 118a-11). He related the various residences where he, his family and brothers resided (R. 119a-30 to R. 120a-30) and that he used the name Adonis beside Doto (R. 121a-9).

Albert Doto testified that his Italian name is Ettore, that he is a registered alien born in Montemarano, Italy, on June 8, 1900, that his father's name is Michael and his mother Maria DeVito (R. 130a-38 to R. 131a-11). He identified his uncles and brothers including defendant (R. 131a-14 to 24) and stated that he learned from his parents that he came to this country in 1909 (R. 131a-28).

Further proof was adduced from the testimony of Salvatore J. Cella, a relative of the Dotos' as to the domicile of the Doto family and its members (R. 171a-20 to R. 172a-17).

Sidney Katz, stenographer at the defendant's deportation hearing in June, 1953, testified that the defendant under oath, stated that he was told that he came to this country from Italy with his mother and that he was accompanied on his arrival in 1909 by his mother and his three brothers (R. 154a-33 to R. 157a-36).

In addition the New York police officer, Conley testified that on February 5, 1922, the defendant, in his presence, at the police station, stated to the desk officer, Lieutenant Donovan, that he was born in Italy and was in this country approximately 10 years (R. 149a-20); that he was 19 years of age, lived at No. 284 Third Avenue and by occupation was a shoe clerk.

BLEED THROUGH POOR COPY

The age given corresponds with the date of birth, November 22, 1902, appearing in the exemplified birth records of Guisepp-Antonio and the occupation as that testified to by his uncle John (R. 104a-14).

From this testimony it is respectfully submitted that the evidence supports the finding of the court that the defendant was in fact born in Italy; that on February 10, 1953, he willfully, intentionally and knowing the same to be false, swore before the Grand Jury that he was born in Passaic, New Jersey (R. 304a-21 to 29). The admission into evidence of the documentary proof as corroboration of the above direct testimony (R. 296a-14 to R. 298a-14) therefore did not prejudice defendant's substantial rights nor did it deprive him of a fair and impartial trial.

It is respectfully submitted that the defendant received a fair and impartial trial; the evidence supports the findings of the Court and in any event the question was not presented to the court below and does not present a basis for review by this Court.

Conclusion.

The attempt by the petitioner to bring the case at bar within the scope of the review power of this Court as shown, *supra*, is actually without merit. Most of the questions presented here quite properly could have been disregarded by the Supreme Court of New Jersey as not having been presented to the trial Court. Yet the Supreme Court of New Jersey reviewed the case and concluded that various documentary evidence was properly admitted within the statutory and decisional law of New Jersey; that no manifest

wrong or injury was sustained by the defendant thereby and that the evidence supported the findings and judgment of the Trial Court.

In view of the non-federal questions raised by the petitioner, it is respectfully submitted that the petition for a writ of certiorari, should be denied.

RALPH L. FUSCO,
Deputy Attorney General of New Jersey,
For the Prosecutor of Bergen County.

On the Brief:

WILLIAM C. BRUDNICK,
Special Assistant Prosecutor.

BLEED THROUGH POOR COPY

APPENDIX.

Statutes Involved.

N. J. S. 2A:131-6—Corroboration unnecessary; proof of materiality.

Corroboration on proof by more than one witness to establish the falsity of testimony or statements under oath is not required in prosecution under this article. It shall not be necessary to prove to sustain a charge under this article, that the oath or matter sworn to was material or, if before a judicial tribunal, that the tribunal had jurisdiction.

N. J. S. 2A:131-7—"Willful" defined.

"Willful" shall, for the purposes of this article, be understood to mean intentional and knowing the same to be false.

N. J. S. 2A:82-27—Judicial notice of foreign law; presumption as to common law.

Whenever the common or statute law of any state is pleaded in any action in any court of this State, the court shall take judicial notice thereof. In the absence of such pleading, it shall be presumed that the common law of such state is the same as the common law as interpreted by the courts of this State.

N. J. S. 2A:82-28—Information of the Court.

The Court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid in obtaining such information.

Statutes Involved.

N. J. S. 2A:82-34—"Business" defined.

> The term "business" as used in this article shall include every kind of business, profession, occupation, calling on, operation of an institution, whether carried on for profit or not.

N. J. S. 2A:82-35—Business Records as evidence.

> A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation; and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the source of information, method and time of preparation were such as to justify its admission.

BLEED THROUGH POOR COPY